STATE OF MICHIGAN
IN THE SUPREME COURT

JOHANNA WOODARD, Individually and as Next Friend of AUSTIN D. WOODARD, a Minor, and STEVEN WOODARD,
Plaintiffs-Appellees and Cross-Appellants,

v

SC: 124994
COA: 239868
Washtenaw CC: 99-005364-NH

JOSEPH R. CUSTER, M.D.,
Defendant-Appellant and Cross-Appellee,

and

MICHAEL K. LIPSCOMB, M.D., MICHELLE M. NYPAVER, M.D., and MONA M. RISKALLA, M.D.,
Defendants.
_____/

JOHANNA WOODARD, Individually and as Next Friend of AUSTIN D. WOODARD, a Minor, and STEVEN WOODARD,
Plaintiffs-Appellees and Cross-Appellants,

v

SC: 124995
COA: 239869
Court of Claims: 99-017432-CM

UNIVERSITY OF MICHIGAN MEDICAL CENTER,
Defendant-Appellant and Cross Appellee.
_____/

124994-5
fo

**PLAINTIFFS-APPELLEES/CROSS-APPELLANTS SUPPLEMENTAL BRIEF**

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## STATEMENT OF NEED FOR SUPREME COURT REVIEW

In this case the primary and intertwined issues, are the trial court's striking plaintiff's[1] qualified expert, as well as application of *res ipsa loquitur* doctrine where the expert has been banned. The trial court's ruling was Dr. Casamassima's lack of subspecialty certification in the area of critical care medicine precluded him from testifying as to standard of care in the board certified area of Pediatrics. It is plaintiff's contention in light of this Court's ruling in the case of *Halloran v Bahn,* 470 Mich 572 (2004), the plain meaning of MCL 600.2169(1)(a) only requires a standard of care expert witness have the same "board certification" against the party against whom testimony is offered. *Halloran* has clarified the issue addressed in *Tate v Detroit Receiving Hospital,* 249 Mich App 212 (2002). Thus this case can be summarily decided and remanded for trial.

Defendants' contend that without expert testimony plaintiff cannot proceed with an *ipsa loquitur* case. Although plaintiff vigorously disagrees with such an assertion, plaintiff states, as a practical matter, applying *Halloran,* thus permitting Dr. Casamassima to be an expert, eliminates defendants' argument as it relates to res ipsa loquitur and therefore their application should be denied.

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[1] Although the caption names Austin's parents as individual plaintiffs, their separate claims have been voluntarily dismissed; leaving only Austin, through his next friend as the sole plaintiff.

## SUPPLEMENTAL BRIEF

### A. Sub-Specialty Matching

The issue of subspecialty matching was addressed by this Court just a few months ago in *Halloran v Bahn*, 470 Mich 572 (2004). In *Halloran*, plaintiff's decedent died from renal failure and cardiac arrest. The alleged malpractice arose out of a claim that Halloran's physician, Dr. Bahn, who was board certified in internal medicine as well as having a sub-certificate in critical care medicine, acted negligently. Further, at the time of the incident when decedent died, Dr. Bahn was providing care and treatment in the critical care unit. Plaintiff's expert in the case was an anaesthesiologist who also had a certificate in the subspecialty of critical care medicine, but was not board certified in internal medicine. This Court, upholding the trial court's striking of the expert witness, followed strict statutory construction as articulated in *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57,63 (2000), stating as follows:

> If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v. Stone,* 463 Mich. 558, 562, 621 N.W.2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. Id. at 577.

As the Court is aware from the briefs in *Halloran*, it is a fact of medical credentialing that sub-specialty certification is not "board certification" for the purposes of the statute. Hence, subspecialty certification should not be considered as part of the statute since certificates are different than board certification.

Pursuant to MCA 600.2169(1) qualification of standard of care experts is a two part test. First, it requires the expert practice within the same specialty as the defendant. Here, Dr.

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Casamassima at the time of the incident and for the year following, was a practicing full-time pediatrician, as were the U of M staff doctors.[2]

Next, MCA 600.2169(1) has a second requirement, specifically if the defendant's doctors are board certified, then the expert must also be board certified in the specialty. It is un-controverted Dr. Casamassima was board certified in the area of Pediatrics. However, defendants claim this was not enough because he did not have a certificate in the **subspecialty** of critical care medicine. In *Halloran*, this Court emphasized there is no exception to the statute for subspecialty matching:

> There is no exception to the requirements of the statute and neither the Court of Appeals nor this court has any authority to impose one. As we invariably stated, the argument enforcing the Legislature's plain language will lead to unwise policy implications is for the Legislature to review and decide, not this Court. Id at 579.

This Court has already made it absolutely clear it will follow the specific statutory requirements for standard of care experts, namely, that they be in the same speciality as the defendant and if the defendant is board certified then plaintiff's expert must be board certified as well. Clearly, Dr. Casamassima meets all of those qualifications.

Although the statute does not impose any further requirements on the standard of care expert, as a practical matter, Dr. Casamassima was in fact familiar with all the procedures being performed in the critical care unit at the time of the bilateral femur fractures. In fact, defendants' argued to Judge Connor that Dr. Casamassima had not performed some of the pediatric procedures he believed could have caused the fractures since his residency. (**Ext T, p 16,** Plaintiff's brief in opposition to

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[2]Both the defendants as well as Judge Connor made much out of the fact that Dr. Casamassima in March of 1998 which was more than a year following the events giving rise to this litigation, switched careers and went full-time as a practicing attorney, and only part-time as a pediatrician. Defendant's repeatedly brought up this fact in an attempt to poison the well as to Dr. Casamassima's overall standing qualifications.

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Defendant's application for Leave to Appeal to this Court). Clearly, defendants cannot have it both ways. If critical care, as defendants allege, is the real area of concern here, why would plaintiff's expert be trained in those procedures in his pediatric residency program? The obvious answer is the procedures involved in this case do not involve critical care medicine, but instead involve ordinary pediatric medicine, which clearly Dr. Casamassima is qualified to testify about.

This Court has acknowledged it cannot add to the statute. To require plaintiff's expert to have anything more than the same board certified specialty, as defendants postulate, is contrary to the plain and clear meaning of the statute. In the underlying Court of Appeals case, Judge, Michael Talbot, did not understand this limitation. On p. 6 of the Opinion, Judge Talbot stated, "the decision in *Tate* mandates because plaintiffs' claims rest in the area of pediatric care critical medicine and because Dr. Custer was **board certified in pediatric "critical care medicine", plaintiff's expert was required to possess that specialty"**. Slip Opinion, p. 6, Emphasis added. As the Court is aware from *Halloran*, there is no such thing as critical care specialty, but merely a certificate in the subspecialty of critical care.

Accordingly, the Court of Appeals erred in ruling here that plaintiff's standard of care expert was required to also have a certificate in the subspecialty of critical care medicine.

**B. Res Ipsa Loquitur**

Defendants in their Application for Leave to Appeal have attempted to distort the facts surrounding the circumstance of Austin's bilateral fractured femurs to convince this court this is not a *res ipsa loquitur* case arising out of defendants' care for Austin while in the critical care unit. They suggest because the parents (and grandparents) had limited access to Austin, this defeats the requirement for exclusive control. Even assuming this to be true, according to defendants' own

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brief, in order to cause the bilateral femur fractures they believe there was a significant force involved. In order to apply sufficient force, either a maneuver of some kind was performed by defendant's staff involving the mechanical manipulation of the child's legs, or alternatively, someone intentionally abused this child. Dr. Owings did not just rule out child abuse, but he ruled it out stating there was not reasonable cause for it. When asked what reasonable cause meant, he defined it as, "how certain do I have to be that I made the correct diagnosis before I am willing to have somebody's appendix taken out." **(Ex O, p 29, Dr. Owings testimony,** Plaintiff's Brief in opposition for Defendant's Application for Leave to Appeal to this Court).

Likewise, Dr. Jeffrey Innis ruled out brittle bone disease **(Ex I, , Loder Dep, and Ex K, 5/22/97, Innis Report,** plaintiff's Response to Defendant's Application for Leave to Appeal).

Finally, both Drs. Farley and Loder, who were U of M treating physicians for Austin, indicated they believed it was very unlikely Austin had osteomyelitis. As discussed in detail in plaintiff's reply brief to defendants' Application for Leave to Appeal, Dr. Farley specifically noted it was unlikely that Dr. Loder missed osteomyelitis. **(Ex J, Farley Dep, pp 17-18,** Plaintiff's Brief in opposition for Defendant's Application for Leave to Appeal to this Court).

Based on the above, it is plaintiff's contention there is no explanation for Austin's femoral fractures other than trauma during a medical procedure, as opined by Dr. Casamassima. This is supported by U of M's own admission of responsibility when Dr. Custer apologized to the parents and suggested they get a lawyer. Further, U of M paid all the medical bills. **(Ex B, pp 4-6** Plaintiff's Brief in opposition for Defendant's Application for Leave to Appeal to this Court). Even when the issue of voluntary payment of the medical bills was in front of the trial judge, defense counsel suggested the hospital was, "feeling bad about an unfortunate result occurring to a newborn

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in the pediatric intensive care unit and trying to offer some consolation or comfort or something to the family." (**Ex B, pp 4-6** Plaintiff's Brief in opposition for Defendant's Application for Leave to Appeal to this Court). In this case, plaintiff contends, taking all favorable inferences particularly the testimony of U of M's own doctors, a strong case exists that University of Michigan Hospital had control over the infant and caused the fractures. Plaintiff, however, does accept if U of M wishes to raise the factual issue of child abuse, in spite of Dr. Owings testimony, they would certainly be free to do so at trial. Plaintiff also accepts that U of M would be able to raise the factual issue of the claimed osteomyelitis causing the fractures, even though U of M's own pediatric orthopedic physicians Dr. Owings and Dr. Farley ruled this out. Nevertheless, the fact they might be able to raise these issues, does not mean plaintiff has not met the burden of proof on control and causation relating to the fractures.

The real thrust of defendants' argument on *res ipsa loquitur* hinges not on the absence of control, but the absence of plaintiff expert testimony to refute defendants' allegations Austin's fractures were as a result of osteomyelitis or child abuse. Plaintiff has more than adequately disproved defendants' assertions utilizing U of M's own treating physicians. If this Court believes in a *res ipsa loquitur* case expert testimony is required, when plaintiff prevails on the issue that there is no requirement for subspecialty matching, plaintiff's expert Dr. Casamassima will be available for expert testimony at trial. Dr. Casamassima will be able to testify as to follows:

- Austin was in intensive care while intubated and sedated, with a pic line, with a feeding tube, with an arterial line in his right groin, and a central venous catheter in his left groin it was impossible for the parents to have, or any other lay person to have any real access to the child and the fractures likely occurred from one of the many different pediatric maneuvers that were done in the hospital.

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- The child was not suffering from osteomyelitis.
- The child did not have brittle bone disease.
- Dr. Owings is correct, there is no evidence of child abuse. (**Ex P-Dr. Casamassima dep, pp 8, 9, 11, 13, 55**, Plaintiff's Brief in opposition for Defendant's Application for Leave to Appeal to this Court).

However, in a *res ipsa loquitur* case of this nature, plaintiff agrees with the Court of Appeal majority that expert testimony would not be needed, and the Court of Appeals decision on this issue should be affirmed.

## RELIEF REQUESTED

Plaintiff urges this Court summarily reverse the Court of Appeals on the issue of sub-specialty matching and remand to the trial court with instructions to apply this Court's holding in *Halloran v Bahn,* 470 Mich 572, (2004). Alternatively, this case could be remanded to the Court of Appeals for reconsideration in light of *Halloran*. In addition the Court of Appeals ruling on the *res ipsa loquitur* issue should be affirmed.

Respectfully Submitted,

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DATED: November 4, 2004

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_____/

**PROOF OF SERVICE**

STATE OF MICHIGAN )
)ss.
COUNTY OF OAKLAND )

ALICIA M. ELIAS, being first duly sworn, deposes and says that she is with the law firm of NEMIER, TOLARI, LANDRY, MAZZEO & JOHNSON, P.C., and that on November 4, 2004, she did serve a copy of **PLAINTIFFS-APPELLEES/CROSS-APPELLANTS SUPPLEMENTAL BRIEF** and this Proof of Service, and deposited same in the United States Mail with postage fully

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Signed and sworn to before me in
Oakland County, Michigan on
November 4, 2004.

STEPHANIE B. ALLARD, NOTARY PUBLIC,
State of Michigan, County of Wayne
Acting in the County of Oakland
My Commission Expires: 08/21/06

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